

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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LM INSURANCE CORPORATION,

Plaintiff,

**MEMORANDUM
AND ORDER**

-against-

21-CV-1802 (KAM)

**SAFETY NATIONAL CASUALTY
CORPORATION, et al.,**

Defendants.
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ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:

In this insurance coverage litigation, plaintiff LM Insurance Corporation ("LMI") has moved to compel defendant Cincinnati Insurance Company ("Cincinnati") to produce claim notes responsive to LMI's Request for Production No. 12 and/or to provide a privilege log for each claim withheld as privileged (other than those reflecting privileged communications with the attorneys representing Cincinnati in this lawsuit). See First Motion to Compel (Nov. 11, 2021) ("LMI Motion"), ECF Docket Entry ("DE") #30. Cincinnati counters that LMI "failed to meet its *prima facie* burden of demonstrating that [the] claim notes . . . are relevant to" Cincinnati's denial of coverage on the ground that Pergament Mall is not an additional insured under the Cincinnati policy. See Response in Opposition (Nov. 16, 2021) ("Cin. Opp.") at 3, DE #31. For the reasons that follow, this Court disagrees.

DISCUSSION

As a preliminary matter, it bears noting that Cincinnati's Response to Request No. 12 objected to LMI's demand for claim notes as seeking privileged documents and as "overly

broad, unduly burdensome, lacking in temporal scope, vague and ambiguous"; Cincinnati's Response did not, however, specifically interpose an objection on relevance grounds. See Response to Request No. 12, DE #30-2 at ECF pp. 11-12. Cincinnati's newly minted relevance challenge, which relies primarily on out-of-circuit district court opinions, takes the position that whether or not Pergament Mall qualifies as an additional insured is "purely related to contractual interpretation," and, in the absence of a claim of bad faith, the claim notes demanded are unlikely to assist LMI in collecting facts as to whether Pergament Mall is an additional insured under Cincinnati's policy. See Cin. Opp. at 3.

Cincinnati concedes, as it must, that courts enjoy broad discretion in resolving discovery disputes, and that once the party requesting discovery has made a *prima facie* showing of relevance, "it is up to the responding party to justify curtailing discovery[.]" Id. at 2 (internal quotation marks and citations omitted). This Court concludes that LMI has sustained its burden, by its explanation that "Cincinnati's claim notes likely include the basis for denying coverage to Pergament Mall, including why it claims the Einstein Contract does not include Pergament Mall as an additional insured, why it claims the alleged accident did not arise out of Einstein's work, and other any [sic] factors it considered in denying coverage to Pergament Mall under Cincinnati's policy." LMI Motion at 3.

In belatedly interposing a relevance challenge, Cincinnati ignores the fact that "[c]ourts in the Second Circuit regularly reject arguments asserted by [insurers such as Cincinnati] that [a plaintiff] should be precluded from discovering extrinsic evidence because the relevant policy language is unambiguous." Virtu Fin. Ins. v. AXIS Ins. Co., 20-CV-6293 (GBD) (KHP), 2021 WL 3862857, at *3 (S.D.N.Y. Aug. 30, 2021) (citing Certain Underwriters at

Lloyd's v. Nat'l R.R. Passenger Corp., 14-CV-4717 (FB), 2016 WL 2858815, at *10 (E.D.N.Y. May 16, 2016) (collecting cases)). As this Court observed in its decision in Certain Underwriters, the suggestion advanced herein by Cincinnati -- to wit, "that unambiguous policy language cannot be undermined through extrinsic evidence [--] presents a challenge that goes to admissibility, as opposed to discoverability[.]" particularly where, as here, the district judge has yet to rule on the ambiguity or clarity of the applicable policy language. Certain Underwriters at Lloyds, 2016 WL 2858815, at *10; accord Virtu Fin., 2021 WL 3862857, at *3. Moreover, under New York law, which may apply in this case, "evidence of intent is relevant until there has been a finding that the policy is subject to only one interpretation." Virtu Fin., 2021 WL 3862857, at *2 (quoting Mariner's Cove Site B Assocs. v. Travelers Indem. Co., No. 04Civ.1913(KMW)(RLE), 2005 WL 1075400, at *1 (S.D.N.Y. May 2, 2005)). Notably, while implying that the demanded claim notes constitute inadmissible extrinsic evidence, Cincinnati hedges its bets as to what evidence it may proffer in connection with Pergament Mall's status under the Cincinnati policy: Cincinnati cryptically observes that, in addition to Cincinnati's denial-of-coverage letter, "any other factors or arguments supporting Cincinnati's position will be fully borne out in a motion for summary judgment." Cin. Opp. at 3; see id. ("Whether Pergament Mall is an additional insured under Cincinnati's policy is entirely dependent on the operative insurance policies, the contracts governing the alleged occurrence in the underlying lawsuit, *and testimony of the parties.*") (emphasis added).

Accordingly, this Court exercises its broad discretion and concludes that Cincinnati has failed to rebut LMI's *prima facie* showing of relevance. To the extent that Cincinnati's letter

in opposition may be construed as contending that the demanded discovery is disproportionate to the needs of the case, see Cin. Opp. at 2, such an argument would be unavailing, as Cincinnati has made no showing whatsoever as to the burden entailed in producing the claim notes, and Cincinnati's time to do so has long passed.

CONCLUSION

For the reasons discussed above, the Court grants LMI's motion to compel and directs Cincinnati to produce the demanded claim notes and any privilege log by December 8, 2021.

SO ORDERED.

**Dated: Brooklyn, New York
November 29, 2021**

/s/ *Roanne L. Mann*

**ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE**